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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-95

LEWIS S. TOLLETT, Warden,
Tennessee State Prison,
Petitioner,

vs.

WILLIE LEE HENDERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.Cert. 1a) is reported at 459 F. 2d 237 (6th Cir. 1972) and the District Court opinion (Pet. Cert. 13a; App. A. 21) is reported at 342 F. Supp. 113 (M.D. Tenn. 1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 20, 1972. The petition for certiorari was timely filed July 17, 1972. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

> §2241. Power to grant writ
>
> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .
>
> "(c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> "(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

QUESTION PRESENTED

Whether the Respondent Waived His Right to Bring a Federal Habeas Corpus Action in 1970 Questioning the Racial Composition of the Grand Jury Which Indicted Him When He Entered a Guilty Plea to the Offense Upon the Advice of Retained Counsel in 1948.

STATEMENT OF THE CASE

Defendant and two others were indicted February 13, 1948, in Davidson County (Nashville), Tennessee (A. 131-A. 133). The indictment charged them with murder in the first degree by unlawfully inflicting wounds on William H. Cotter on January 22, 1948 (A. 132), which wounds caused him to linger, languish and die February 12, 1948 (A. 132).[1]

Mr. Henderson signed a confession acknowledging his participation in the robbery attempt (Pet. Cert. 2a).

On the advice of retained counsel, he entered a plea of guilty in exchange for a sentence of 99 years in the state penitentiary.[2]

State Post-Conviction Proceedings

In January, 1968, Mr. Henderson, a Negro, filed a state habeas corpus petition (A. 45) alleging, *inter alia*, systematic exclusion of members of his race from the Davidson County grand jury. (A. 45-46). An evidentiary hearing was eventually held on this petition in state court. (A. 80-A. 125). The proof showed that the first black man to serve as a grand juror in Nashville was Dr. H. H. Walker, appointed April 16, 1953. (A. 102, A. 104, A. 116, A. 123, A. 142).

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[1] The deceased was a liquor store employee who was seriously shot in the abortive hold-up attempt. He died after languishing in pain for twenty-one days (A. 131-A. 133) (Pet. Cert. 1a).

[2] The death penalty was frequently used in 1948 in Tennessee. From 1946 to 1949 there were 16 executions carried out at the Tennessee State Prison. Four other condemned men had their sentences commuted and one was killed attempting to escape. Source: Tennessee Prison records on condemned men, 1916 to date.

The state trial judge denied relief on the question of exclusion of blacks (A. 63-A. 65) and the Tennessee Court of Criminal Appeals affirmed. (A. 143-A. 169). The Tennessee Supreme Court denied certiorari. (A. 143).

Federal Post-Conviction Proceedings

Mr. Henderson then filed a petition for a writ of habeas corpus in Federal Court in Nashville, alleging, *inter alia*, that Negroes were systematically excluded from the grand jury which indicted him in 1948.

The United States District Court, Honorable Frank Gray, Jr., relying on the records filed of the state proceedings[3] (A. 37-A. 169), held that there was exclusion of Mr. Henderson's race from the grand jury because no Negro so served "until some years after petitioner was indicted, despite the fact that roughly one quarter of the population . . . were members of that race", and because the venire was in 1948 "marked with the designations 'c' or 'col.' for 'colored'." (A. 19). Judge Gray felt as a matter of law this showed systematic exclusion of blacks. He also felt there was no waiver by the guilty plea since neither petitioner nor his counsel[4] would have thought to challenge the composition of the grand jury in 1948.

The District Judge quoted from Judge Galbreath of the Tennessee Court of Criminal Appeals, who had remarked,

---

[3] 28 U.S.C. § 2247 (1966) provides: "[on] application for a writ of habeas corpus, documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence."

[4] The attorney hired for Mr. Henderson in the 1948 proceeding filed an affidavit (A. 95-A. 96) in the 1968 state proceeding in which he stated that the exclusion of Negroes from the grand jury issue was never discussed with Mr. Henderson.

"no lawyer in the State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948 . . ." (A. 32) (A. 149).

The State's appeal to the Sixth Circuit was unsuccessful. In an opinion by Judge Celebrezze, the court also rejected the State's theory of waiver. (Pet. Cert. 1a-12a).

This Court granted certiorari in this case on October 16, 1972. Certiorari was granted a week earlier in another case involving waiver by a federal guilty plea.[5]

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[5] **Clifford H. Davis v. United States**, No. 71-6481, **certiorari granted** — U.S. — (October 10, 1972). Mr. Melvin Wulf of the ACLU is now acting as counsel for Mr. Davis. The Clerk advises that **Davis** and this case will probably be heard together.

SUMMARY OF ARGUMENT

The Nashville grand jury which indicted Mr. Henderson in 1948 had its first Negro member in 1953. This complied with then-applicable constitutional standards which prohibited only purposeful, deliberate exclusion because of race. Given the social climate in the South in 1948, a black on the grand jury would have been purposely put there because of his race. In reality, this Court should recognize the transformation in the law since 1948 of the concept of what state action amounts to systematic exclusion from jury service.

It was proper that the State require a challenge to the venire to be made prior to a plea to the merits. The federal courts have required this also. **Shotwell v. United States**, 371 U.S. 341 (1963).

A plea of guilty on advice of counsel waives the right to later challenge the grand jury. Mr. Henderson's attorney saved him from the electric chair by his negotiated plea. Others, including Mr. Justice Marshall, had challenged the grand jury venire in a celebrated Tennessee case without success. This Court had denied certiorari. Mr. Henderson actually benefited by not raising the grand jury question because this would have injected race into the case. He was guilty by his own admission, and the police had his signed confession. At the most, the issue raised in this case is harmless error.

If this Court gives Henderson the relief he requests thousands of other convicted defendants, similarly situated, will be released, unless the relief granted is prospective only. The State has a legitimate interest in the finality of its judgments, particularly where the collateral attack is on a matter extraneous to the guilt or innocence of the defendant.

ARGUMENT

1. Blacks Were Not Systematically Excluded From the Nashville Grand Jury as That Term Was Understood in 1948.

The lower federal courts cite **Strauder v. West Virginia**, 100 U.S. 303 (1880), for the proposition that the States have been under a constitutional mandate since 1880 not to exclude Negroes from juries. **Virginia v. Rives**, 100 U.S. 313 (1880), decided the same day as **Strauder**, defined exclusion of Negroes from the grand jury in terms of laws prohibiting grand jury service by blacks merely because they were black.

Justice Strong for the majority said:

> "The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the County of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.
>
> "Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the venire, by which one third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege

for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person, by the law of the State, or by any Act of Congress, or by the 14th Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz.: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any federal statute. It is not, therefore, guaranteed by the 14th Amendment, or within the purview of section 641." 100 U.S. at 322-323.

Justice Field, concurring, said:

"The denial of rights or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the State, as for example, an Act excluding colored persons from being witnesses, making contracts, acquiring property, and the like. With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community." 100 U.S. at 333.

Further:

"The application to the state court, upon the refusal of which the petition was presented, was for a venire composed of one third of their race—a proceeding wholly inadmissible in any jury system which obtains in the several States.

"From the return of the District Judge, it would seem that in his judgment the presence of persons of the colored race on the jury is essential to secure to them the 'equal protection of the laws'; but how this conclusion is reached is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws? Foreigners resident in the country are not permitted to act as jurors, yet they are protected in their rights equally with citizens. Persons over sixty years of age in Virginia are disqualified as jurors, yet no one will pretend that they do not enjoy the equal protection of the laws. If, when a colored person is indicted for a criminal offense, it is essential, to secure to him the equal protection of the laws, that persons of his race should be on the jury by which he is tried, it would seem that the presence of such persons on the Bench should be equally essential where the court consists of more than one judge; and that if it should consist of only a single judge, such protection would be impossible. To such an absurd result does the doctrine lead, which the Circuit Court announced as controlling its action." 100 U.S. at 335.

Before the murder in this case took place, **Kennedy v. State**, 186 Tenn. 310, 210 S.W. 2d 132 (1948), **certiorari denied** 333 U.S. 846 (1948), was decided. It stemmed from a prosecution for assault to commit murder. No Negroes had ever served on the Columbia, Tennessee grand or petit jury which convicted the Defendant. Mr. Justice Marshall, as one of the defense attorneys, lost his bid to show that blacks had been "systematically

excluded" as that term was understood at that time. The Tennessee Supreme Court said in **Kennedy**:

> "It is next insisted that the court erred in not holding that the defendant was discriminated against by the exclusion of Negroes from the grand jury.
>
> "On the hearing of the plea in abatement, the defendant introduced a number of witnesses whose testimony is that in their memory and for the last fifty years, no Negro had served on either the grand or petit jury in Maury County. The State's evidence showed that Maury County operated under a jury commission law; that the jury commissioners for the county met in July, 1944, and that they then filled the jury box by taking names from the 1943 tax books; and that these tax books contained no identifying symbols whereby the race of any taxpayer might be known. The evidence further showed that at the February 1946 term of court, at which the defendant was indicted, there was drawn from the jury box a list of one hundred and nine names to be summoned for jury service at that term of court. Of these one hundred and nine names so drawn, ten are shown to belong to the colored race. The record discloses that two of those so drawn of the colored race had died in the interim between July, 1944, when their names were put in the box, and the date of their being summoned for jury service; that one had removed from Maury County; and that two were actually summoned and excused at their own request. The record fails to disclose what became of the other five.
>
> "The State concedes that a presumption of discrimination can arise from a showing that no Negroes have either been summoned for jury service or have served on grand juries for so long a period of time as to give rise to the belief that the failure is deliberate rather

than accidental, but the State insists that such a presumption must yield to the undisputed facts when the question of discrimination is raised. There is no contention made of disproportionate representation of the Negro race on these panels, but the claim made is that of an utter absence of such representation.

"In **Norris v. Alabama**, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, 1077, the evidence showed an apparent tampering with the list from which the jury had been selected so as to evidently substitute the names of several Negroes upon such list for members of the white race. In that case the excerpt relied upon by the defendant shows that no names of Negroes were placed on the jury roll. In the present case the testimony shows that the names of ten Negroes were placed on the jury list.

"In **Akins v. Texas**, 325 U.S. 398, 65 S.Ct. 1276, 89 L. Ed. 1692, it was held that where the jury commissioners placed the name of one Negro on a panel of sixteen from which the grand jury should be drawn, this fact evidenced an intent not to discriminate against members of the colored race.

"It should be borne in mind that members of the Negro race have no constitutional right to trial by a mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries. The testimony of the jury commissioners is to the effect that when they placed the names of seven hundred and fifty or more taxpayers in the jury box for subsequent drawing, they were not aware as to the race of a great many of the persons whom they placed therein, but undertook to select a proportionate number of such persons from the various civil districts of the county without regard to their race. That this must be true

is evidenced by other testimony in the record. A Negro teacher called by the defendant testified that he was summoned for jury duty at a time previous to the impanelment of the grand jury that indicted the defendant and was excused from jury service at his own request. The evidence further shows that at the November term 1946, at which defendant was tried, one Negro appeared for jury service and was present awaiting such until the entire panel of some fifteen members was excused by the trial judge. The evidence also shows that one member of the colored race, Henry McGlothlin, was on a list of jurors drawn from the jury box in drawing a panel to select the petit jury for the trial of this case. The proof shows that these names which were drawn from the box were placed therein by the jury commission in July, 1944, or more than a year and a half before the commission of the alleged crime in this case." 186 Tenn. at 316-318, 210 S.W. 2d at 134-135.

A similar challenge mounted by Henderson's attorney so soon after the Kennedy decision would have proved to be an exercise in futility. As one commentator pointed out:

"It may be felt that such an objection would stir up racial feeling against the defendant, thereby damaging his chances for acquittal or a lighter sentence. Or perhaps the defense believes that it makes no difference to the outcome of the case whether or not there is jury exclusion, and that the trial should not be prolonged by a 'mere technical objection'."

Note, 72 Yale L.J. 559, 565 (1963.)

Mr. Henderson is black. The deceased was white. There was no reason for his attorney, knowing the police had a confession, to raise the racial issue in these circumstances. The duty of counsel in this case was to save the

life of his client by keeping him from being electrocuted, which was a frequent occurrence in Tennessee at that time.

While it would be easy now, with twenty-four years hindsight, to second guess defense counsel, it would have been a mistake in trial tactics had the defendant injected the racial issue. Since for the purpose of this proceeding, we assume the defendant was guilty because he entered a plea of guilty and because he confessed, the most that would have been accomplished by successfully raising the systematic exclusion question would be a new indictment. This is unlike **Kennedy** where the plea was not guilty and prevailing on the exclusion issue would have meant a new trial.

It seems hypocritical to imply in 1972 that the law has been fixed and immutable since **Strauder**. In 1948, Nashville was in a position similar to that of the other southern states. As required by **Strauder** and **Virginia v. Rives**, *supra*, blacks were not kept off grand juries because of their race. If a black had been on a grand jury in Tennessee in the 1940's, given the social climate of the times, he probably would have been chosen **because** of his race to fill some sort of quota. This is perhaps the reason Dr. H. H. Walker was chosen as the first black grand juror in 1953.

The petitioner is not attempting to justify grand jury practices in the South in 1948, but 1948 procedures should not be tested by what we now understand is a constitutionally adequate grand jury. Tennessee's practice in 1948 met the constitutional standards of 1948 and should be accorded that respect.

A fifteen year old boy was recently sentenced to death in Arkansas. **State v. Joe Newton Kagebein**, Cir. Ct. of Arkansas Co., So. Dist., **pending on appeal** Arkansas Supreme Court, No. 5665. Who is to say, 24 years from now,

an "enlightened" society will not consider the exclusion of young people from grand juries as constitutionally infirm as the exclusion of any other minority? See **Trop v. Dulles**, 356 U.S. 86, 100, speaking of "the evolving standards of decency that mark the progress of a maturing society." See also, **Furman v. Georgia**, 408 U.S. 238 (1972).

2. The State had a valid interest in requiring that a defendant raise any objections to the racial composition of the grand jury before entering his plea to the indictment.

The Tennessee courts have held that unless the defendant objects by a motion or plea in abatement to the venire before he pleads to the indictment, he cannot thereafter avail himself of the claim that the venire was improperly composed. See **State ex rel. Lawrence v. Henderson**, 1 Tenn. Crim. App. 199, 433 S.W.2d 96 (1968), and cases cited therein. See also **State v. Cole**, 28 Tenn. 626 (1849); **McPigue v. State**, 63 Tenn. 313 (1874); **Turner v. State**, 89 Tenn. 547, 15 S.W. 838 (1891); and **Ellis v. State**, 92 Tenn. 85, 20 S.W. 500 (1892).

Federal Rule of Criminal Procedure, Rule 12(b)(2)[6] and the notes of the Advisory Committee on Rules ap-

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[6] The pertinent provisions of Rule 12 are as follows:

* * * * * * * *

"(b) **The Motion Raising Defenses and Objections.**

* * * * * * * *

(2) Defenses and Objections Which Must Be Raised: Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

parently reach the same results in the Federal Courts. Those notes are as follows:

"Note to Subdivision (b) (1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rule of Civil Procedure.)

"In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure.) Among the defenses and objections in this group are the following: illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc."

The Sixth Circuit admits the rule in Tennessee is as stated and the federal rule is as stated. That Court further admits that the rule in the Sixth Circuit is as elsewhere, that a voluntary plea of guilty made by an

accused while represented by competent counsel waives all non-jurisdictional defects and that the racial composition of a grand jury is non-jurisdiction in nature and subject to waiver. **Michener v. United States**, 170 F. 2d 973 (8th Cir. 1948), and **Hunt v. State of Georgia**, 445 F. 2d 1228 (5th Cir. 1971).

In promulgating Rule 12, this Court provided that objections based on defects in the institution of the prosecution or in the indictment or information must be raised by pretrial motion or they are waived. Exceptions are provided as to jurisdictional defects and the failure of the indictment on its face to charge the defendant with the commission of an offense.

In **Shotwell v. United States**, 371 U.S. 341, reh. den., 372 U.S. 950 (1963), it was held that under Rule 12(b)(2) a federal criminal defendant who failed to object to alleged defects in the composition of the grand and petit juries before trial waived such objections. In **Shotwell**, the complaints concerning jury composition were that the jury commissioner delegated his selection duties to one of his private employees, that volunteers were permitted to serve on the juries, and that the clerk failed to employ a method of selection designed to secure a cross-section of the population. Portions of that opinion are here quoted:

> "We think, as the two lower courts did, that petitioners have lost these objections by years of inaction. Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C. provides: 'Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from

the waiver.' Petitioners concede, as they must (emphasis supplied), that this Rule applies to their objection to the grand jury array, but deny that it applies to their objection to the petit jury array. On the latter point we do not agree. In **Frazier v. United States**, 335 U.S. 497, 503, this court stated that a challenge to the method of selecting the petit jury panel comes too late when not made before trial. And the lower federal courts have uniformly held that an objection to the petit jury array is not timely if it is first raised after verdict. See e.g., **Hanratty v. United States**, 5 Cir., 218 F.2d 358, 359, **cert. denied**, 349 U.S. 928; **United States v. Klock**, 2 Cir., 210 F.2d 217, 220; **Higgins v. United States**, 81 U.S. App. D.C. 371, 160 F.2d 222, 223, **cert. denied**, 331 U. S. 822; **United States v. Peterson**, D.C., 24 F.Supp. 470.

"Petitioners have not advanced any reasons for overturning this settled course of decision. Rather, they argue that when public officials violate constitutional rights by actions whose illegality is not readily noticeable by the litigants or their counsel, sufficient cause has been shown to warrant relief from application of the Rule. **Ballard v. United States**, 329 U.S. 187, is said to stand for the broad proposition that technical rules of procedure do not prevent this Court from considering the merits of a basic challenge to the method of jury selection.

"In the circumstances of this case, petitioner's contentions are without foundation. In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. In-

quiry as to the system employed could have been made at any time. Indeed, the acceptance of volunteers for the juries had received publicity in the newspapers, and their presence on the petit jury could have been ascertained at the time it was constituted. And **Ballard** lends no support to petitioners' position, for in that case the challenge to the jury panel had been timely made and preserved. See 329 U.S., at 190.

"Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In **Ballard** it was said (at p. 195), that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule.

"We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost." 371 U.S. at 362-364.

Since the decision in **Shotwell**, the Fifth Circuit has held that where such objections are not made prior to trial or plea of guilty, they are waived. **Pinkney v. United States**, 380 F. 2d 882 (5 Cir. 1967); **Jackson v. United States**, 394 F. 2d 114 (5 Cir. 1968); **Brooks v. United States**, 416 F. 2d 1044 (5 Cir. 1969); **Bustillo v. United States**, 421 F. 2d 131 (5 Cir. 1970) and **Throgmartin v. United States**, 424 F. 2d 630 (5 Cir. 1970). Contra, **Fernandez v. Mier**, 408 F. 2d 974 (9 Cir. 1969).

3. Mr. Henderson waived his right to challenge the Grand Jury by pleading guilty.

When Mr. Henderson entered his guilty plea, he confessed in open court that he and his associates, while robbing a liquor store, shot Mr. Cotter, who died twenty-one days later. The language of **Johnson v. Zerbst**, 304 U.S. 458, 464 (1938), speaking of waiver in the context of "an intentional relinquishment or abandonment of a known right or privilege" is inapplicable here. **Fay v. Noia**, 372 U.S. 391, 399 (1963), said "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief," leaving the question to be decided on a case by case basis. **Henry v. Mississippi**, 379 U.S. 443 (1965) made clear the implication in **Fay** that some decisions made by counsel which entail the waiver of a constitutional right may be made by counsel without consultation with the accused. This Court in **Henry** said, "where the circumstances are exceptional," 379 U.S. at 451, the defendant will not be precluded from asserting constitutional claims. The implication is that the accused may be bound by his attorney where the circumstances are not exceptional. **Henry** requires the courts to determine whether the circumstances of the case before them are exceptional enough to invalidate the waiver of constitutional claims made in good faith by retained counsel.[1] Accord, **Murch v. Mottram**, 41 U.S.L.W. 3250 (U.S. Nov. 6, 1972) (holding defendant bound by his attorney's actions and quoting language used by the Fourth Circuit that "there are a great many instances where a party must be bound by a mistake of his counsel").

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[1] This is a paraphrase of Judge Clark's dissenting opinion in **Winters v. Cook**, ___ F. 2d ___ (5th Cir., No. 71-3323, decided September 20, 1972). **Winters** held that a 1963 plea of guilty to a Mississippi murder indictment did not bar a Negro from a federal habeas corpus action in 1971 challenging the racial composition of his grand jury.

In the present case there is no evidence of any negligence or incompetence by counsel for Mr. Henderson. His client admitted his guilt. The police had a confession. Counsel advised his client to plead guilty. Based on a recommendation of ninety-nine years as a result of the plea, the defendant was spared the electric chair. A lawyer of the eminence and skill of Mr. Justice Marshall had attacked the racial composition of the grand and petit juries in the **Kennedy** case tried near Nashville. Counsel for Mr. Henderson did everything that could be done for his client—he saved his life. It would have done no good to object to the grand jury.[8] There was no extant recognized right which could be said to have been "waived".

4. A valid conviction in this case should be accorded finality and not overturned needlessly.

When current grand jury criteria are applied to grand juries of a quarter of a century ago, the practical effect is that the new constitutional rule of criminal procedure is being applied retroactively. This Court has refused to apply such a rule where the defendant was unable to demonstrate actual prejudice. **Adams v. Illinois**, 405 U.S. 278 (1972). This Court recognized in **Jenkins v. Delaware**, 395 U.S. 213, 219 (1969), ". . . society's legitimate concern that convictions validly obtained [should] not be needlessly aborted . . ."

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[8] Even in December, 1968, the state trial judge in his memorandum opinion (A. 63-A. 65) said there was no exclusion on Mr. Henderson's venire. The Davidson County Criminal Judge said (at A. 64): "Petitioner [Willie Lee] Henderson called Judge Hart, a retired jurist of this county and the judge before whom the conviction was had, as a witness. We believe that the testimony of Judge Hart although it does show that relatively few Negroes served on the petit juries during the 1940's, that his testimony taken as a whole certainly negatives the idea of purposeful exclusion of members of the Negro race. The law under which this defendant was indicted and tried provided the same method of jury selection as is used currently in Davidson County and we have held there is no such exclusion resulting from the present system."

A liberal measure of finality is to be accorded to a plea of guilty by a criminal defendant. See **McMann v. Richardson**, 397 U.S. 759 (1970); **Parker v. North Carolina**, 397 U.S. 790 (1970); **Brady v. United States**, 397 U.S. 742 (1970); and **North Carolina v. Alford**, 400 U.S. 25 (1970).

This Court in **McMann** stated:

> "In our view a defendant's plea of guilty based on reasonably competent advise is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770, 771.

Judge Clark, dissenting in the Fifth Circuit case of **Winters v. Cook**, *supra*, says (slip. op. at 20-21):

> "If **McMann** stands for the proposition that habeas corpus is not available where counsel has given erroneous advice to his client who pleads guilty as a result thereof, surely we should not intervene where the attorney merely failed to inform his client of a single possible constitutional claim which he thought best to use as coin for barter with the prosecution. Where the attorney reached a more than arguably correct decision involving many complicated and uncertain variables, we should not impose a rule requiring that he inform his client as to the precise nature of each variable. A lawyer ought not have to conduct a course in constitutional law for his client to validly discharge his position of trust.

"The possibility of prejudice in this case is less than a gossamer one. I have no doubt but that petitioner would have pleaded guilty even if he had known of his constitutional claim. If the rule proscribing more severe penalties on retrial had not existed, thus allowing him to seek a new trial without sacrificing the advantage he secured by his guilty plea, this petition would never have been exposed to the clerk's file stamp. Lawyers worth their salt, as the one condemned today most certainly is, acutely feel the oppressive weight of professional responsibility when it must carry the stake of human life. I say counsel here fully merited the confidence bestowed on him. This decision not only misjudges the man, it does violence to our system of justice."

If Mr. Henderson, who was represented by retained counsel and plead guilty, is entitled to habeas corpus relief, so will all those defendants who were indicted prior to 1953 when the first Negro was seated on the Davidson County, Tennessee grand jury. Not only will Negroes be entitled to this relief, but also all defendants raising this claim. See **Peters v. Kiff**, 407 U.S. 493 (1972). Should this right be given to defendants who entered pleas of guilty, then it must also be extended to those who professed their innocence. The floodgates would be open. Any retroactive application of this doctrine "would seriously disrupt the administration of our criminal laws." **Johnson v. New Jersey**, 384 U.S. 719, 731 (1966). The Court should hold here that "[t]he unusual force of the countervailing considerations strengthens our conclusion in favor of prospective application." **Stovall v. Denno**, 388 U.S. 293, 299 (1967). Under the criteria announced in **Chapman v. California**, 386 U.S. 18 (1967) and **Harrington v. California**, 393 U.S. 250 (1969), any error in the 1948 grand jury also was "harmless beyond a reasonable doubt."

CONCLUSION

The judgment of the Sixth Circuit should be reversed and the petition for the federal writ of habeas corpus dismissed.

Respectfully submitted

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